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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. CLIFFORD MICHAEL BICKFORD, Defendant and Appellant.	C032829 (Super. Ct. No. CM009819)

Following a retrial, a jury convicted defendant Clifford Michael Bickford of two counts of committing a lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (a)), and the court imposed a total sentence of 8 years of imprisonment.[1]

Defendant's first trial on these charges had resulted in a mistrial after the jury had deadlocked on the two lewd act counts. And at that trial, defendant had been acquitted of additional charges of intimidating a victim (Pen. Code, § 136.1,

[1] The sentence consisted of the middle term of 6 years on count 1 and 2 years on count 2 as the subordinate term.

subd. (c)(1)) and assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).

On appeal in this case, defendant claims that he received ineffective assistance of counsel from the same trial attorney who represented him at the first trial. Defendant asserts that his trial attorney allowed the prosecution to bolster "a weak, unpersuasive case with inadmissible evidence" -- specifically, hearsay evidence, character evidence, and irrelevant and prejudicial evidence -- which prevented him from receiving a fair trial where "a different result was reasonably likely." Defendant also faults his attorney for failing to present an expert "regarding the reasons for false testimony in sexual abuse cases." We shall affirm.

Defendant's charges of incompetence primarily involve his counsel's failure to make objections to evidence. In fact, counsel did make many of the objections that he is accused of neglecting. Further, objections are often tactical matters, which we will not second-guess on appeal unless the defendant can establish that his counsel had no rational tactical purpose for the alleged inaction. Defendant fails to make any such showing. Finally, defendant's claim that his counsel should have called an expert leaves us to speculate what specific testimony such an expert might have offered. The record's failure to disclose counsel's reasons for this supposed omission disposes of the claim. It is settled that where the record does not show why counsel failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless

there simply could be no satisfactory explanation" for the action, an appellate court must affirm the judgment. (*People v. Hart* (1999) 20 Cal.4th 546, 623-624 [internal quotes omitted].) We find that defense counsel's decision not to pursue this course of action can be satisfactorily explained.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Underlying Facts*

Rachael, 12 years old in the summer of 1997, lived in Bangor with her family. Rachael babysat defendant's infant son and "ran around together all the time" with his wife. When she babysat, Rachael sometimes stayed the night in defendant's trailer home, sleeping on the couch.

One such night in May or June 1997, just before the end of the school year, Rachael woke up to find defendant moving his hand on her chest under the tank top that she was wearing. She pretended to be asleep, but opened her eyes a little and saw the defendant. Rachael rolled over on her stomach, defendant stopped touching her, and she eventually went back to sleep. The next morning Rachael did not tell anyone what had happened.

On July 11, 1997, Rachael again stayed over at defendant's house. She fell asleep in a recliner while watching a movie with defendant and his wife. She woke up when defendant picked her up and moved her to the couch. However, she was awakened again sometime later by defendant, who was touching her on the chest as he had the first time. She again pretended to be asleep,

testifying that she "didn't know what he would do to me."[2] Defendant stopped and went to the kitchen (where Rachael could see him and noticed that he was wearing white briefs). A few seconds later, defendant came back, laid down on the couch next to her, returned to the kitchen, came back again, and laid down next to Rachael after she had rolled onto her back. He started touching her chest under her shirt again. Defendant then put his hand inside the leg of Rachael's shorts and his finger into her vagina. Rachael began to cry. Tears ran down her cheek. After a few minutes, defendant stopped and left.

B. *The Charges*

Defendant was charged with two counts (counts 1 and 2) of committing a lewd and lascivious act upon a child under the age of 14 (Pen. Code, § 288, subd. (a)), one count (count 3) of intimidation of a victim (Pen. Code, § 136.1, subd. (c)(1)), and two counts (counts 4 and 5) of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).

The intimidation and assault charges arose from an incident in August 1997 -- the month following the alleged lewd acts -- when defendant had allegedly swerved his truck and made an obscene gesture at Rachael, her sister, and some other children while they were walking on the road near a store in Bangor.

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[2] Rachael testified that she was afraid of defendant "[b]ecause he hits his wife." She described an instance when they "were joking around, [and] playing cards" and defendant had hit Rachael on the back of her head and choked his wife.

C. *The First Trial*

The case was tried to a jury, which acquitted defendant on the intimidation and assault charges (counts 3 and 4). The prosecution dismissed count 5 (the second assault charge). The jury deadlocked on the two counts of lewd acts on a child (counts 1 and 2), and the court declared a mistrial.

D. *The Second Trial*

At the second trial on the lewd act charges, defendant was represented by the same defense counsel as at his first trial.

At trial, Rachael testified, describing the two 1997 incidents, the circumstances of her disclosure of the incidents to her friends and family, and the alleged swerving encounter with defendant in August 1997.

Rachael's sister testified about the swerving incident and an altercation between defendant and his wife that she (the sister) had related to Rachael.

Rachael's school friend, Laura, testified to Rachael's disclosure of the touching incidents. And Rachael's mother described the circumstances of Rachael's disclosure of the touching incidents and the swerving encounter, the criminal investigation process, and a civil lawsuit that she had filed against defendant.

The prosecution also called sheriff's deputies and a sexual assault investigator, who testified as an expert on common misunderstandings about the reactions of sexually abused children.

Defendant testified, denying that he had touched Rachael on her chest or had put his hand inside her shorts and his finger in her vagina. But most of defendant's testimony focused on other matters, including: the claim that he swerved his truck at Rachael; the card game at which he "guess[ed]" he could have hit Rachael and "pushed [his wife] out of [his] way and went on outside"; an altercation with his wife in 1996 described by Rachael's sister; a dispute over the sale of his truck to Rachael's parents in June 1997, around the time when defendant was accused of molesting Rachael; and the civil lawsuit by Rachael's mother against him.

The defense also called a character witness; defendant's nephew, who testified that Rachael had suddenly hit defendant on the forehead during the card game; the operator of the store in Bangor, who testified about the alleged swerving encounter; and defendant's father, who also testified about that encounter, as well as the circumstances under which Rachael's father had communicated her allegations of molestation to defendant's family.

The jury convicted defendant on both counts of lewd acts upon a child.

II. DISCUSSION

Defendant's sole contention on appeal is that he received ineffective assistance of counsel at his second trial.

A. *Standard for Ineffective Assistance of Counsel*

The California Supreme Court has recently restated the principles applicable to this claim: "To prevail on a claim of ineffective assistance of counsel, defendant 'must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.] Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." [Citation.] Finally, prejudice must be affirmatively proved; the record must demonstrate "a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [Citations.]'" (*People v. Hart, supra,* 20 Cal.4th at pp. 623-624, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 333; *People v. Fosselman* (1983) 33 Cal.3d 572, 581 [reversal of conviction for ineffective assistance of counsel "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission"].)

B. *Failure To Object To Evidence*

Four of five of defendant's charges of his counsel's ineffectiveness involve his claimed failure "to object to and

obtain the exclusion of certain patently inadmissible evidence adduced at trial by the prosecution."

However, claims of ineffective assistance of counsel, based on a failure to object to evidence, are among those least likely to succeed in reversing a conviction. (*People v. Lucas* (1995) 12 Cal.4th 415, 444 ["The decision whether to object to evidence at trial is a matter of tactics and, because of the deference accorded such decisions on appeal, will seldom establish that counsel was incompetent"].) "'The failure of counsel to object at the trial does not ordinarily indicate either incompetence of counsel or unfairness to the client. The system of objections is a useful tool in the hands of a trained professional for the exclusion of matter which should not be received into evidence. But the indiscriminate use of objections, solely because they are available, aids neither the client nor the cause of justice. The choice of when to object and when to allow the evidence to come in as offered is inherently a matter of trial tactics. Ordinarily, the tactical decisions of trial counsel will not be reviewed with the hindsight of an appellate court. [Citations.] . . . There may be considerations not shown by the record, which could never be communicated to the reviewing court as a basis for its decision.'" *(People v. Perry* (1969) 271 Cal.App.2d 84, 114-115, citation omitted; accord, *People v. Freeman* (1994) 8 Cal.4th 450, 490-491 ["[T]he decision whether to object is inherently tactical, the failure to object to evidence will seldom establish incompetence."]; *People v. Neely* (1999) 70 Cal.App.4th 767, 783

["Whether to object to testimony and on what grounds are generally tactical matters"].)

Thus, unless defendant can establish that there was "no conceivable tactical reason for counsel's decision not to raise these objections" (*People v. Neely, supra,* 70 Cal.App.4th at p. 783), we will decline the invitation to second-guess trial counsel on appeal.

1. *Hearsay*

Defendant first claims that his counsel failed to object on the basis of hearsay to certain questions. Defendant contends that "[t]he record is replete with the prosecution's use of hearsay which should have been objected to by [defendant's] attorney as inadmissible" pursuant to Evidence Code section 1200, subdivision (b).[3]

However, defendant makes no effort to show that there was no tactical reason for his counsel's failure to object. Since the record on appeal fails to disclose that counsel had no rational tactical purpose for his actions, this claim must fail. (*People v. Fosselman, supra,* 33 Cal.3d at p. 581.)

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[3] Evidence Code section 1200 provides:

"(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

"(b) Except as provided by law, hearsay evidence is inadmissible.

"(c) This section shall be known and may be cited as the hearsay rule."

Defendant first identifies as hearsay the prosecutor's opening statement that the Rachael's mother called defendant's wife and Child Protective Services to report the molestation incidents to them. Obviously, counsel's statements are not evidence and not subject to a hearsay objection. Indeed, before both opening and closing statements, the trial court reminded the jury that the statements of counsel were not evidence. And defense counsel may not have wanted to draw undue attention to this point in the prosecutor's opening statement by objecting.

Defendant next challenges as hearsay testimony regarding Rachael's statements to her friend, her boyfriend, and family members about "what happened" at defendant's residence on July 11 shortly after the second molestation incident. Similarly, defendant claims that testimony concerning contacts with law enforcement officials to report the incident to them was subject to a hearsay objection.

The prosecution, however, offered this testimony as evidence of a "fresh complaint" (1) to counter the anticipated defense that Rachael concocted the incident to aid her family in their dispute with defendant over their purchase of his truck and (2) to establish the chronology of the delay in law enforcement's investigation of the incident after it was reported, which led to Rachael's mother's institution of a civil suit and application for a temporary restraining order against defendant.

In *People v. Brown* (1994) 8 Cal.4th 746, the California Supreme Court confirmed the viability of the "fresh complaint" doctrine to help establish whether a sexual offense occurred, but

disclaimed the doctrine's traditional premise -- the belief that it was natural for a victim of a sexual assault to inform someone immediately after the incident -- which had been undermined by empirical studies showing assault victims are often reluctant to disclose the incident. (*Id.* at pp. 754-759) But the Court concluded that the doctrine continued to serve the purpose of countering the persistent inference by society and jury members that an assault that was not promptly reported did not occur. (*Id.* at pp. 758-759.) The state high court concluded:

"As we shall explain, we conclude that, *under principles generally applicable to the determination of evidentiary relevance and admissibility*, proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose -- namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others -- whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." (*Id.* at p. 749; original italics.) The Court further explained that "evidence of the fact and circumstances of a victim's complaint" is relevant for "a variety of nonhearsay purposes": (1) "if such a victim did, in fact, make a complaint promptly after the alleged incident, the circumstances under which the complaint was made may aid the jury in determining whether the alleged offense occurred," and (2) the "admission of evidence that such a prompt complaint was made also will eliminate the

risk that the jury, if not apprised of that fact, will infer that no such prompt complaint was made." (*Id.* at p. 761)

In this case, Rachael's prompt report after the second incident was relevant. The principal defense theory was that Rachael invented, or was directed to invent, sexual abuse claims to aid the family in the dispute with the defendant over money owed from the sale of defendant's truck to them. Rachael's disclosure of the circumstances of the second incident -- particularly to non-family members -- immediately after it occurred was relevant to counter skepticism that would have arisen if there had been no evidence of a prompt complaint.

Indeed, at defense counsel's request, the parties and the trial judge discussed prior to the commencement of testimony the relevance and admissibility of the anticipated evidence under the "fresh complaint" doctrine. The court ruled that it would allow the testimony of a prompt complaint after the incident, but would give -- as defense counsel also requested -- a limiting instruction that "the evidence [was] not being admitted for the truth of the matter asserted but for a limited purpose of showing a complaint was made." Indeed, the Supreme Court in *People v. Brown* acknowledged the validity of case law that required the trial court, upon request, to instruct the jury to consider the evidence only for the limited purpose of establishing that the complaint was made. (*People v. Brown, supra*, 8 Cal.4th at p. 757.) In this case, the trial judge gave the limiting instruction twice during the trial, upon defense counsel's objection to the evidence and request for the instruction, and

additionally, gave a final instruction admonishing the jury not to consider evidence admitted for a limited purpose for any other purpose.[4]

The testimony about Rachael's report of the molestation was also relevant, as the prosecution claimed, to establish a chronology of the delay in law enforcement's investigation of the charges, which had led to Rachael's mother's institution of a civil suit against defendant. Defense counsel in his opening statement had contended that the civil lawsuit was brought to resist, and in response to, defendant's claim that Rachael's parents had failed to pay him for the pickup truck that he had sold them. Defendant claimed that he first became aware of the molestation allegations "[s]hortly after the pickup [truck] was due to be paid off in full." Thus, the testimony served two non-hearsay purposes. And any particular failure to object -- although objection was made on various occasions -- had a rational basis.

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[4] The Court in *People v. Brown* also cautioned that extrajudicial statements about the details of an offense should not be admitted under Evidence Code section 352 if their probative value is outweighed by the risk the jury will consider it for hearsay purposes or that the evidence will create a danger of undue prejudice or will mislead or confuse the jury. (*People v. Brown, supra,* 8 Cal.4th at p. 763.) Among the portions of testimony that defendant deems objectionable, we have found only one seven-line passage (including the prosecutor's questions) where the details of the July 11 incident were discussed (by Rachael's mother). While defendant challenges counsel's failure to object to this testimony on hearsay grounds, he does not argue on appeal that it should have been excluded under Evidence Code section 352 and has thus waived the point. (*Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 391.)

Defendant also challenges his counsel's failure to object to testimony by Rachael's mother that Rachael had reported to her the incident in which defendant had swerved his truck at Rachael and some friends. But defense counsel objected to the testimony on the ground of hearsay, and the court gave a limiting instruction.[5]

Finally, defendant complains about the failure of his counsel to object after the court overruled his objections. But repetitious hearsay objections by defense counsel would have accomplished nothing; counsel was not ineffective for failing to lodge them. (*People v. Padilla* (1995) 11 Cal.4th 891, 937 [counsel not ineffective for failing to make futile objection where hearsay testimony was discussed at length outside the presence of the jury and the court ruled it was admissible], overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Venegas* (1994) 25 Cal.App.4th 1731, 1741-1742 [counsel not ineffective for failing to object to evidence where objection was overruled when the prosecution initially offered the evidence].)

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[5] Defendant's list of challenged testimony also includes references to out-of-court statements that are plainly inconsequential. For example, defendant claims that counsel should have objected to Rachael's mother's recounting of a conversation with county officials concerning whether the family members were residents of Butte County. Defense counsel is not ineffective where he "could have reasonably determined that there was no tactical advantage in objecting to the prosecutor's relatively innocuous questions." (*People v. Hayes* (1990) 52 Cal.3d 577, 622.)

Accordingly, defendant's claim of ineffective assistance of counsel based on the latter's purported failure to make hearsay objections is without merit.

2. *Criminal Conduct Of Which Defendant Was Acquitted*

Defendant next contends that defense counsel was ineffective because he failed to object to, or move to strike, evidence of the August 1997 incident where defendant allegedly swerved his truck at Rachael, her sister, and others who were walking down the road near a local store. According to defendant, this evidence was inadmissible because he was acquitted of the offenses based on this conduct at his first trial. He concludes: "This testimony was used to make it appear that he had some malice toward the victim, or was trying to silence her" in order to portray defendant as a "'bad man.'"

Defendant does not specify the authority on which he claims the evidence was inadmissible. "In light of the failure to provide proper legal support, we need not consider this argument." (*Ojavan Investors, Inc. v. California Coastal Com., supra,* 54 Cal.App.4th at p. 391.)

Moreover, assuming defendant's contention is that the testimony was inadmissible character evidence (Evid. Code, § 1101, subd. (a)), irrelevant (Evid. Code, §§ 210, 350), or more prejudicial than probative (Evid. Code, § 352), defendant makes no effort to establish that "there simply could be no satisfactory explanation" for withholding an objection. (*People v. Hart, supra,* 20 Cal.4th at pp. 623-624; *People v. Lucas,*

supra, 12 Cal.4th at p. 445.) It is defendant's obligation to establish that there was "no conceivable tactical reason for counsel's decision not to raise these objections" (*People v. Neely, supra,* 70 Cal.App.4th at p. 783), and therefore this claim must fail.

In fact, the record amply demonstrates that counsel had at least one reasonable tactical objective. Before the prosecution asked the questions that defendant specifically challenges on appeal, defense counsel argued that the trial court ought to take judicial notice of, and the jury be informed of, defendant's acquittal of the vehicular assault. Defense counsel could have reasonably concluded that the best opportunity to introduce this evidence was in response to testimony about the underlying event that gave rise to the charge and acquittal. Through evidence of the acquittal, defendant could argue that Rachael's charges against him had been found lacking in the past. However, argument on defense counsel's request for the introduction of defendant's acquittal was postponed while the prosecution asked Rachael's sister and her mother about the swerving incident. The court accepted the prosecution's argument that the testimony about the purported vehicular assault on the victim was offered solely to establish Rachael's and others' state of mind for purposes of explaining their decision to file a civil suit against defendant and to further show that the molestation charge was not trumped up to resist defendant's claim of money owed. But the court found that the prior acquittal on the criminal charge based on that incident was irrelevant.

Defense counsel's failure to persuade the court to let the jury learn of defendant's acquittal, of course, does not mean he was ineffective. (*People v. Cox* (1991) 53 Cal.3d 618, 662 ["Lack of success does not reflect incompetence of counsel."]; *People v. Page* (1980) 104 Cal.App.3d 569, 575 [a tactic which in hindsight appears to have backfired does not necessarily reflect incompetence of counsel].)

Accordingly, since defendant did not show that there could be no rational tactical purpose in not objecting to the questions about the swerving incident, this claim fails. (*People v. Rios* (1992) 9 Cal.App.4th 692, 704-705 [defense counsel's decision to forego further objections was satisfactorily explained as tactical decision in light of defense theory argued in closing argument].)

3. *Violent Acts*

Defendant's third claim is that his trial counsel failed to object to the following testimony by Rachael's sister about an occasion in which defendant became angry and violent:

"Q. Did you ever see Mr. Bickford [the defendant] become violent or angry?

"A. Once.

"Q. What happened? Do you remember when that was?

"A. No. It was reported, though. It was at her mom's.

"Q. Well, wait a minute. Let's try and -- was this the early summer of 1997, before that, after that?

"A. It was before what happened to Rachael.

“MR. BLAKE [Defense counsel]: Your Honor, I’m going to object. Can we approach?

“THE COURT: Sure.

(Discussion at the bench).

“MR. BLAKE: Which event are we talking about?

“MS. PASSMORE: Well, I can have her specify.

“THE COURT: Why don’t you clarify what your objection is.

“MR. BLAKE: My objection is it’s not relevant to the issues at trial in this case and is certainly an improper characterization to attach to my client in her case in chief unless she can tie it to something relevant in this case.

“THE COURT: What’s the relevance?

“MS. PASSMORE: The relevance is Rachael’s fear of the defendant, and it’s based upon her own observation of the defendant beating up his wife and hitting her in the back of the head but also her sister telling her about what she saw him do when he lost his temper.”

Thus, defense counsel *did* object to the evidence as irrelevant and an “improper characterization” of his client. This certainly encompasses the grounds now raised by defendant -- irrelevance and impermissible character evidence.

Moreover, the court overruled the objection on ground of relevancy, accepting the prosecution’s argument that the “relevance [was] Rachael’s fear of the defendant,” which would explain why Rachael did not promptly report the first incident. Thus, any failure to earlier object was harmless by reason of the court’s decision to overrule the objection.

Defendant also complains about his defense counsel's failure to object to the same questions after the court overruled counsel's objections, but this did not constitute ineffective assistance because the objections had been made, and further objection was futile. (*People v. Jones, supra,* 96 Cal.App.3d at p. 827.)

Defendant now asserts that his counsel should have also objected that the evidence "was unduly prejudicial in relation to its probative value." But counsel could have reasonably concluded that he was better off avoiding a scattershot approach to his objections. Given defense counsel's view that the evidence was not relevant, his decision not to raise an objection that the evidence was more prejudicial than probative may have been a tactical decision to avoid undermining his position that the evidence was completely irrelevant. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1024-1025 [defense counsel "may have elected not to make a prejudice objection for the reason that it would have been inconsistent with his position that the prior flight evidence had no admissible probative value whatsoever"].) Again, defendant does not show that there could be no tactical reason for defense counsel's approach.

Finally, defendant argues, citing *People v. Robertson* (1982) 33 Cal.3d 21, that "[e]vidence of the character of a criminal defendant for violence, i.e., the propensity for violence, is properly excludible as being unduly prejudicial when not directly relevant to the charge in question."

But here, counsel objected and the court found the evidence relevant. Further, *People v. Robertson, supra,* is distinguishable. That case involved testimony concerning a statement by defendant, who was charged and convicted of murder, that he had also killed two others. The state Supreme Court ruled that evidence of the commission of a prior crime may not be proved by evidence of an extrajudicial admission without proof *aliunde* that the crime had been committed. (33 Cal.3d at p. 41.) The court concluded: "Given the obvious potential for prejudice arising from the fact that the jury might improperly consider the defendant's statement as proof that he had previously killed two other women, we think that the statement should clearly have been excluded." (33 Cal.3d at p. 42.) Here, we do not deal with prior crimes testimony, only an act of potential violence that suggested why Rachael might have been fearful about reporting the molestation incidents earlier. Defense counsel objected to the testimony, but was overruled. There was no ineffective assistance of counsel.

4. *Criminal Complaint Process*

Rachael's mother testified about her reporting the molestation incident and about the length of time that law enforcement's investigation took. Defendant contends that defense counsel should have objected to evidence of the long criminal complaint process as "unduly time-consuming and unduly prejudicial to the defendant" under Evidence Code section 352.

The prosecutor argued that the evidence was relevant to the issue of law enforcement's delay in pursuing the charge, which

had led to Rachael's mother's institution of a civil suit against defendant. This evidence was meant to rebut the defense theory that the civil suit was brought in response to defendant's claim that Rachael's parents had failed to make the payments on the truck that they had purchased from him.

In any event, like defendant's other examples of incompetence, defense counsel did object on relevance grounds when this evidence was initially presented, but the objection was overruled.

Moreover, we are unable to discern any significant prejudice to defendant in the testimony about the foot-dragging of law enforcement officials. We agree with the People that the evidence "had nothing to do with [defendant] or his actions, but rather was merely explanatory of the actions of [Rachael's] family." To prevail on a claim of ineffective assistance of counsel, defendant must establish not only deficient performance, but resultant prejudice. (*People v. Hart, supra,* 20 Cal.4th at pp. 623-624.) This defendant has failed to do.[6]

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[6] Defendant refers to the "undue consumption of time" provision under Evidence Code section 352 as another basis for objection, but makes no argument on this score other than to characterize the testimony as "a great body of evidence of how the complaint was handled by law enforcement officials" and the "relatively lengthy evidence of the criminal complaint process." However, all case authority construing Evidence Code section 352 cited by defendant addresses the "undue prejudice" ground for exclusion of evidence. (Evid. Code, § 352, subd. (b).) Thus, we need not consider the matter. A point "'perfunctorily asserted without argument in support'" is not properly raised on appeal. (*People v. Williams* (1997) 16 Cal.4th 153, 215, citation omitted.) Furthermore, we are hard pressed to understand how testimony that ***(Continued.)***

C. *Expert Witness*

Defendant also faults counsel for failing to call an expert "to explain why complainants fabricate stories of sexual abuse, and to explain the indicia of fabrication present in the tale told by the alleged victim."

But the record contains no information or explanation concerning why defense counsel did not offer such expert testimony. Accordingly, based on the silence in the record before us, we must affirm the judgment on appeal "'unless there simply could be no satisfactory explanation'" for counsel's failure to present such expert testimony. (*People v. Hart, supra*, 20 Cal.4th at p. 623-624; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 ["A claim in such a case is more appropriately decided in a habeas corpus proceeding"].)

We think the decision not to call a sex offense expert is not one for which there could be no satisfactory explanation. Counsel may have determined that such evidence could well become a two-edged sword or that such testimony would be vulnerable to attack. After all, the prosecution's expert had stated only brief, general opinions about the reactions of sexually abused children and the circumstances of sex offenses. Testimony by a defense expert of the "indicia" of false testimony in sexual abuse cases could have furnished the prosecution with an opportunity to obtain the defense expert's agreement with the prosecution's expert's opinions. (*People v. Gray* (1986)

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occupied a relatively brief portion of a five-day trial constituted "undue consumption of time."

187 Cal.App.3d 213, 220 [defense expert agreed with prosecution expert on behavioral traits seen in molestation cases including delayed reporting].)

Furthermore, defendant never advises us what such an expert would have testified to. He does not identify the "myths" or "misperceptions" about which a defense expert would have testified. Nor does he explain how such testimony would have addressed the facts in this case. We therefore have no basis for determining what prejudice arose from the failure to offer such an expert. Thus, defendant also fails to establish the prejudice element of his ineffective assistance claim.

There is, of course, no rule that a defense expert is the sine qua non of an adequate defense in a molestation case, and the practice is not otherwise. (See, e.g., *People v. McAlpin* (1991) 53 Cal.3d 1294, 1294-1302 [prosecution presented testimony of victim and her mother, as well as expert on child molestation investigations, while defense consisted of defendant's testimony and character witnesses]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 728, 733-737 [prosecution's case-in-chief included testimony of child sex abuse expert, while the "defense consisted primarily of attacking [the victim's] credibility"]; *People v. Bowker* (1988) 203 Cal.App.3d 385, 388-390 [prosecution included fact witnesses, examining physicians, and child abuse expert, while defense relied on defendant's denial that he touched the children and their statements indicating sexual conduct had occurred with a babysitter].)

Accordingly, defendant has not established that defense counsel was ineffective for failing to present expert testimony of an unspecified nature on sexual abuse complainants.

III. DISPOSITION

The judgment is affirmed.

Kolkey, J.

We concur:

Blease, Acting P.J.

Morrison, J.